



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 28, 2008

Ms. Erica Escobar  
Bracewell & Giuliani LLP  
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San Antonio, Texas 78205-3603

OR2008-01280

Dear Ms. Escobar:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 300611.

The Lake Travis Independent School District (the "district"), which you represent, received eight requests from the same requestor for eight categories of information pertaining to six named individuals and a specified elementary school parent organization during specified time periods.<sup>1</sup> You state you have provided the requestor with some of the responsive information. You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>2</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

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<sup>1</sup> You inform us that the district sought and received clarifications of two of the requests from the requestor. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup> A copy of this letter may be found on the Office of the Attorney General's website at [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted, among other things, redacted education records for our review. You state that the district will withhold the redacted information, which you state consists of personally identifiable information, pursuant to FERPA. Accordingly, we will address the applicability of the claimed exceptions to the remainder of the submitted information.

Next, you state that the information you have highlighted in yellow is not responsive to the requests. Information that is not responsive to the requests need not be released. Moreover, we do not address such information in this ruling. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

You assert that some of the submitted information is protected by both common-law and constitutional privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has determined that common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). Furthermore, there is a legitimate public interest in a public employee’s work performance. *See* Open Records Decision No. 444 at 5-6 (1986) (public has interest in public employee’s qualifications, work performance, and circumstances of employee’s resignation or termination). The information you claim is protected by privacy, which you have marked in green, pertains to communications regarding alleged misconduct between a district administrator and a parent organization leader of a district school. Although this information could be considered highly intimate or embarrassing, because these communications pertain to a public employee’s alleged misconduct on the job, there is a legitimate public interest in this information. Thus, the information you have marked in green is not protected by common-law privacy and may not be withheld under section 552.101 on this basis.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s

privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After reviewing the information you have marked in green, we find that because the information pertains to work performance, you have not demonstrated how any of the information falls within the zones of privacy. Moreover, we find that the public's need to know information relating to the work performance of government employees generally outweighs an individual's privacy interests for purposes of constitutional privacy. Thus, none of the information marked in green may be withheld under section 552.101 in conjunction with constitutional privacy.

Next, you claim that certain e-mails are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire

communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the e-mails at issue are communications between district attorneys and district employees, and that these communications were made in furtherance of the rendition of legal services and advice for the district. You further state that all of these communications were made in confidence, intended for the sole use of the district and its attorneys, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails at issue. Accordingly, the district may withhold the e-mails you have marked in blue brackets under section 552.107.

Next, we address your arguments under section 552.111 of the Government Code, which excepts from public disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2* (1990).

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). In *Gilbreath*, the Third Court of Appeals found that the deliberative process privilege aspect of section 552.111 was analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). *See ORD 615 at 2* (quoting *Gilbreath*, 842 S.W.2d at 412). The court found that subsequent to the passage of the Act by the Texas Legislature, federal court decisions and decisions from this office were interpreting the deliberative process privilege too broadly, straying from the interpretation for Exemption 5 that Congress intended. *See id.* The court held that this privilege “exempts those documents, and only those documents, normally privileged in the civil discovery context.” *Id.* Therefore, at the direction of the court, this office narrowed the scope and interpretation of the deliberative process privilege, applying the same discovery-based approach applied by federal courts in early interpretations of this privilege. *See id.* at 3. Prior to the passage of the Act, the United States Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), determined that the purpose of the privilege was to promote the frank discussion of legal or policy matters within governmental agencies. *ORD 615 at 3* (quoting *Mink*, 410 U.S. at 87). Likewise, the court in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), stated that the purpose of the privilege was to foster “frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to

operate.” ORD 615 at 4 (quoting *Carl Zeiss*, 40 F.R.D. at 324). The court in *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972), held that the privilege applies to “opinions, conclusions, and reasoning reached by Government officials in connection with their official duties.” ORD 615 at 5 (quoting *Simons-Eastern*, F.R.D. at 88-89). In *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), the court held that the privilege was intended to protect “those internal working papers in which opinions are expressed and policies formulated and recommended.” ORD 615 at 5 (quoting *Ackerly*, 420 F.2d at 1341). In light of these court decisions, this office has determined that section 552.111 excepts from disclosure only the advice, recommendations, and opinions of members of the governmental body at issue that relate to a policymaking matter. *See* ORD 615 at 5. Furthermore, the fact that a document may have been used in the policymaking process does not bring that information within the privilege.

You state that the information submitted at Tab 4 consists of two memoranda exchanged between district administrative officials. You also state that these memoranda “contain advice, recommendations and opinions on proposed [d]istrict policies.” One memorandum contains recommendations from a committee comprised of administrators, teachers, and parents. Parents, however, do not have policymaking authority. Furthermore, you have not demonstrated how the teachers on this committee have policymaking authority. Thus, because the entire committee did not have the power to create policy and section 552.111 only excepts the advice, recommendations, and opinions of employees and other individuals upon whom rests the responsibility for making policy decisions, the memorandum from administrators, teachers, and parents does not fall under the deliberative process privilege. Additionally, the remaining memorandum does not contain advice, opinions, and recommendations pertaining to policymaking matters, but consists entirely of factual information. Thus, this memorandum does not fall under the deliberative process privilege. Therefore, none of the information submitted at Tab 4 may be withheld under section 552.111.

Next, we address your claim that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov’t Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold the personal information that pertains to a current or former employee of the district who elected, prior to the district’s receipt of the request for information, to keep such information confidential. You indicate that the employee in question timely chose not to allow public access to his personal information. Accordingly, we agree that the district must withhold the information that you have highlighted in blue pursuant to section 552.117(a)(1) of the Government Code.

Next, the remaining information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(b). You do not inform us that the owners of the e-mail addresses have affirmatively consented to release. Therefore, the district must withhold the e-mail addresses you have highlighted in pink, in addition to the e-mail addresses we have marked, under section 552.137.

Finally, we note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district may withhold the e-mails you have marked in blue brackets under section 552.107 of the Government Code. The district must withhold the information that you have highlighted in blue pursuant to section 552.117(a)(1) of the Government Code, and the e-mail addresses marked under section 552.137 of the Government Code. The remaining information must be released to the requestor in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body

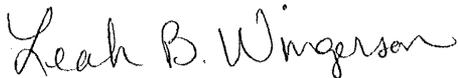
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 300611

Enc. Submitted documents

c: Mr. David Lovelace  
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(w/o enclosures)